No. 84-1044

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
TOWARD UTILITY RATE NORMALIZATION,
CONSUMERS UNION,
CONSUMER FEDERATION OF CALIFORNIA,
COMMON CAUSE OF CALIFORNIA,
CALIFORNIA PUBLIC INTEREST RESEARCH GROUP, AND
CALIFORNIA ASSOCIATION OF UTILITY SHAREHOLDERS,
Appellees.

On Appeal from the Supreme Court of California

MOTION TO DISMISS

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Appellees Toward Utility Rate Normalization (TURN), California Public Interest Research Group, Common Cause of California, Consumers Union, and Consumer Federation of California move the Court to dismiss this appeal on the ground that it does not present a substantial federal question. Sup. Ct. R. 16.1(b). This motion also presents several additional reasons why this case should not be set for oral argument. Sup. Ct. R. 16.1(d).

STATEMENT OF THE CASE

Appellees adopt the statement of the case set forth in the Motion To Dismiss concurrently being filed by Appellee California Public Utilities Commission.

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal arises out of a temporary and experimental effort by the California Public Utilities Commission (PUC) equitably to apportion the "extra space" in a utility billing envelope between the utility and its customers.[1] After holding in a prior proceeding that this extra space is "ratepayer property"—a holding which is now final under California law—the PUC issued an order permitting TURN to use the extra space in the Pacific Gas & Electric Co. (PG&E) billing envelopes four times a year for the next two years.[2] That order has since been affirmed by the California Supreme Court.[3]

During the eight months of each year when TURN's materials will not be included in the billing envelope, Appellant may use the extra space as it sees fit. During the other four months, it may also make use of any extra space not used by TURN (PUC App. 22); and, even if TURN should utilize all the extra space, Appellant may include additional materials in the envelope if it pays the extra postage. Every TURN insert placed in the billing envelope "shall clearly identify TURN as its source and state

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[1] The PUC has defined the "extra space" as "the space remaining in the billing envelope, after inclusion of the monthly bill and any required legal notices, for inclusion of other materials up to such total envelope weight as would not result in any additional postage cost." *See* Appendix to the PUC's Motion to Dismiss (hereafter "PUC App.") at 3.

[2] The PUC found in its decision that TURN "represent[s] the interests of a substantial segment of [Appellant's] residential ratepayer population." PUC App. 19.

[3] Although the California Supreme Court did not issue an opinion when it rejected Appellant's constitutional challenges to the PUC's order, it is settled law in California that the denial of a petition for review, even without opinion, "is a decision on the merits both as to the law and the facts presented in the review proceedings." *People v. Western Airlines, Inc.*, 42 Cal. 2d 621, 630, 268 P.2d 723, 728 (1954). The implication in the Jurisdictional Statement and several of the amici briefs that the issues presented by this case have never been considered by a court is thus unfounded.

that its contents have neither been reviewed nor endorsed by [Appellant] or [the] Commission." *Id.* at 39. Funds received by TURN as a result of its billing inserts may be used only for "purposes related to ratepayer representation in Commission proceedings involving [Appellant]." *Id.*

Contrary to Appellant's claim that the California Supreme Court's decision impairs its right to communicate (by displacing its monthly newsletter, the PG&E *Progress*, from the billing envelope in favor of TURN's inserts), Appellant's ability to communicate with its customers has not been restricted. Nothing in the decision prevents Appellant from sending *Progress* (or anything else) to its ratepayers just as it has done in the past. *See* Part I(A), *infra*.

It is theoretically possible, of course, that including both the TURN inserts and *Progress* in the billing envelope during a particular month might require Appellant to pay additional postage. But this possibility does not create a substantial First Amendment claim. To begin with, Appellant failed to show below that the materials which TURN proposes to insert in the billing envelopes will in fact require Appellant to pay additional postage if it wishes to communicate with its customers. Any threat of injury to Appellant is thus wholly speculative and, hence, not ripe for adjudication. *See* Part I(B)(1), *infra*.

Moreover, even if the evidence below had demonstrated that Appellant would inevitably have to pay additional postage as a result of the California Supreme Court's decision, no substantial constitutional question would be presented. At most, the decision would merely shift the postage costs for *Progress*—which until now has been getting a "free ride" in the billing envelope—from Appellant's ratepayers to its shareholders. Such a cost shift merely places Appellant in the same position as all non-utility users of the postal system, who are required to pay their own postage. Requiring Appellant to pay for the cost of communicating its views would hardly work an unconstitutional infringement of its right to speak. *See* Part I(B)(2), *infra*.

Because Appellant has failed to identify any abridgement of its First Amendment freedoms, the PUC's allocation of the extra

space need not satisfy *any* of the traditional tests which this Court has developed to assess official actions which impair First Amendment values. But even if the decision below had some measurable impact on Appellant's First Amendment rights, it would easily pass constitutional muster. Because the decision is "content-neutral," it need not pass the "compelling state interest" test designed for governmental attempts selectively to suppress disfavored kinds of speech. At the very most, then, the only applicable First Amendment standards would be those used for evaluating "time, place and manner" restrictions or regulations having only an incidental effect on speech to which the principles set forth in *United States v. O'Brien*, 391 U.S. 367 (1968), are applicable. *See* Part I(C)(1), *infra*.

The California Supreme Court's decision easily satisfies these standards. It is narrowly tailored to serve numerous important governmental interests: promoting greater participation in PUC proceedings, preventing Appellant's ratepayers from being forced to subsidize the communication of Appellant's messages, providing Appellant's customers with a diversity of views, ending Appellant's monopolization of the economic value inherent in the extra space, and remedying Appellant's prior use of that space in violation of federal law. The decision also leaves open ample alternative means of communication—indeed, Appellant may continue to use the same means of communication that it always has. *See* Part I(C)(2), *infra*.

Nor are Appellant's right not to associate with TURN or its right to remain silent violated by the California Supreme Court's decision. *See* Part II, *infra*. Because the order explicitly requires TURN's materials to identify their source and to disassociate TURN's messages from PG&E, there is no danger that any reader will identify TURN's words with those of Appellant, nor is there any need for Appellant to disassociate itself. Moreover, the Commission and the California courts defined the "extra space" as ratepayer property in a prior proceeding, and that earlier decision, being final, may not be challenged here. Appellant has no right under the First Amendment to prevent California from enforcing third-party access to property which, as a

matter of state law, does not belong to it and which has historically been used as a vehicle for messages both written by the Commission and composed by PG&E to meet Commission requirements.

In addition to the insubstantiality of Appellant's constitutional claims, there are numerous prudential reasons, discussed in Part III, *infra*, why plenary consideration of this case would be inappropriate. There is no conflict in the decisions of the lower courts, nor does the decision below contravene this Court's cases. Moreover, the PUC's order is a temporary experiment, which may be modified if experience shows—which the record does not—that Appellant's ability to communicate will be adversely affected. Because any adverse impact of an access requirement on Appellant's own speech may be quickly averted by modification of the order, consideration of the constitutional issues presented here should occur, if at all, only after the PUC has concluded its experiment and adopted a permanent decree providing access to the billing envelope which has an impact on the exercise of Appellant's First Amendment rights that is established by a proper record.

ARGUMENT

I

APPELLANT HAS FAILED TO SHOW THAT THE CALIFORNIA SUPREME COURT'S DECISION INFRINGES ITS RIGHT TO COMMUNICATE WITH ITS CUSTOMERS THROUGH THE BILLING ENVELOPE.

A. Appellant's Right To Communicate With Its Customers Is Not Limited Or Restricted By The California Supreme Court's Decision.

Appellant's first constitutional challenge to the California Supreme Court's decision affirming the PUC's order is based upon the assertion that the order limits its right to communicate by "either denying or severely restricting appellant's right to disseminate its own information to its customers." J.S. 13. This limitation will occur, Appellant claims, because the TURN

inserts may displace from the billing envelope the PG&E *Progress*, which Appellant states is its "primary means of communicating with its customers." *Id.* at 4. Appellant thus contends that "[w]hether or not [it] will be able to communicate with its customers through the billing envelope" will depend on whether there is any extra space left over after the TURN inserts. *Id.* at 13.

Appellant's professed concern for its ability to communicate has no basis in the facts of this case. Nothing in the decision below bars Appellant from enclosing its newsletter (or anything else) in customer billing envelopes whenever it chooses to do so.[4] During eight months of the year, Appellant may insert *Progress* in the envelope precisely as it has previously done; in those months, the entire cost of that mailing will continue to be borne by the ratepayers.[5] In the remaining four months, Appellant will be similarly free to send *Progress* to its customers, along with TURN's insert, provided only that it pays the additional postage, if any, which the inclusion of *Progress* might require. The California Supreme Court's decision therefore does not impair PG&E's right to communicate with its customers in any way; and, as shown in the next section, the requirement that PG&E pay any additional cost does not raise a substantial First Amendment question.

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[4] Indeed, the PUC has expressly disclaimed any attempt to control Appellant's use of the extra space, as far as the content of its communications is concerned. PUC App. 22, 38. *See also* PUC Motion to Dismiss at 6, 17.

[5] The PUC's present practice is to require Appellant's shareholders to bear the costs of preparing and printing *Progress* (J.S. 4), but to permit Appellant to recover all other costs associated with mailing the newsletter (including postage) from the ratepayers. PUC App. 6-7. Appellant's newsletter thus gets a "free ride" in the billing envelope at the ratepayers' expense. *See* note 7, *infra*.

B. The Speculative Possibility That Appellant's Shareholders—Rather Than Its Ratepayers—Might Be Required To Pay The Cost Of Mailing *Progress* In The Billing Envelope Does Not Raise A Substantial First Amendment Question.

1. Appellant Failed To Demonstrate That The Decision Below Would Result In Any Incremental Expenditure For Its Own Communications.

The only conceivable impact which the decision below might have on Appellant's ability to communicate is that Appellant's shareholders might be required to pay the postage for mailing *Progress* if, during a "TURN month," the TURN inserts and *Progress* consume more than the available extra space. But there is nothing in the record to suggest that this eventuality is likely to occur. Although Appellant contends that its ability to communicate with its customers during the four "TURN months" will be dependent on TURN's "decision as to the length of its message or even the weight of paper it uses" (J.S. 13), Appellant presented no evidence in the proceeding below on these subjects. Nor did Appellant present evidence concerning the amount of extra space in the average billing envelope or the average weight of *Progress*. Indeed, while Appellant cross-examined TURN's executive director and one of its attorneys for the better part of three days, Appellant failed even to inquire how long TURN's inserts would be or what grade of paper it would use. Appellant thus brings this case to the Court on the basis of a factual record which simply fails to support its contention that it will be unable to insert *Progress* into the billing envelope without paying additional expense.[6]

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[6] What evidence exists on this subject indicates that Appellant's ability to use the extra space without incurring additional expense is not in danger. After reviewing the flyer sent out as a result of the PUC's decision in the *UCAN* case (*see* J.S.App. 90-110), TURN's attorney stated that TURN "could develop something that would be very light, much lighter than the *Progress* . . . ." Transcript of Proceedings before the PUC (hereafter "Tr.") 304. The same attorney also stated during the PUC hearing that TURN could abide by a weight limitation of three-tenths of an ounce on its billing inserts. Tr. 393.

In order to establish a constitutional violation, Appellant must show that the "threat of injury" to its First Amendment right to communicate is "both 'real and immediate,' not 'conjectural' or 'hypothetical.' " *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). That standard has not been met here. Appellant failed to demonstrate below that TURN was likely to consume so much of the extra space that Appellant would necessarily be required to pay additional postage. Thus, in this case, as in *Socialist Labor Party v. Gilligan*, 406 U.S. 583 (1972), there is "[n]othing in the record [which] shows that [Appellant has] sustained any injury thus far, and the law's future effect is wholly speculative." *Id.* at 589. Appellant has therefore failed to establish the first prerequisite of its constitutional claim: that it "has suffered or is immediately in danger of sustaining some direct injury" to its right to communicate. *O'Shea v. Littleton, supra*, 414 U.S. at 494 (citing *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923)). *Cf. Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 543 (1980) (claim by utility commission that prohibition of political bill inserts was necessary to prevent displacement from billing envelope of other, more desirable messages rejected where commission failed to show that presence of political inserts would prevent inclusion of other materials).

2. The California Supreme Court's Decision Would Raise No Substantial Constitutional Question Even If Appellant Had Demonstrated That Its Shareholders Would Be Required To Pay For The Cost Of Mailing *Progress* To Its Customers.

If Appellant had proven below that the California Supreme Court's decision to affirm the PUC's order would inevitably require it to pay additional postage to send *Progress* to its customers, its constitutional claims might be "riper," but they would be no more substantial. For even in that event, the "worst case" effect of the California Supreme Court's decision would simply shift the cost of distributing Appellant's newsletter from its ratepayers to its stockholders—and then for only four of the twelve mailings of *Progress* in each of the next two years.

Even if it had been established by the record, this cost shift would raise no colorable claim under the First Amendment. It

would not impair Appellant's right to communicate nor would it single out Appellant's speech for discriminatory treatment. At most, it would deprive the *Progress* of the "free ride" in the billing envelope it has previously enjoyed, by virtue of Appellant's monopoly status, and force Appellant's shareholders to bear the same expense for mailing *Progress* that all other non-monopoly users of the postal service incur in mailing their messages.[7] However, there is no constitutional bar against requiring Appellant "to pay postage in a manner identical to other Postal Service patrons . . . ." *United States Postal Service v. Greenburgh Civic Associations*, 453 U.S. 114, 127 (1981). For this reason, an order which potentially shifts the cost of mailing *Progress* from Appellant's ratepayers to its shareholders deprives Appellant of no First Amendment rights, but only of its unique ability as a regulated monopoly to force its captive customers—who must of necessity purchase Appellant's services—to pay the mailing expenses of its newsletter.[8]

It is quite plain that the Commission, in the exercise of its established rate-setting authority, could have required in the first

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[7] Professor Tribe has described the "free ride" that utility messages now enjoy as follows:

> "The fact is that the management of the public utility and the shareholders of the public utility get a rather sweet deal. They get to stuff the envelope with their message *at no extra cost to them.* That is, after all, why the message is stuffed in this envelope instead of being separately mailed. It takes a free ride on a fixed resource over which the state gives the utility a monopoly. In this sense, the ratepayers are indirectly forced to subsidize the inclusion of a message with which they may not agree." (J. Choper, Y. Kamisar, and L. Tribe, *The Supreme Court: Trends and Developments* (1979-80) 248 (emphasis added))

[8] Even if PG&E was not merely being deprived of an unjustified "free ride," the fact that Appellant's use of the billing envelope might become more expensive would not render the PUC's decision constitutionally suspect. *See City Council v. Taxpayers for Vincent*, ____ U.S. ____, 52 U.S.L.W. 4594, 4601 n.30 (May 15, 1984) (prohibition of posting signs on public property upheld despite claim that alternative means of communication were more expensive).

instance that costs attributable to mailing *Progress* be charged to Appellant's shareholders, rather than its ratepayers, for rate-making purposes. *See Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 543 (1980) (no reason to assume that commission could not exclude cost of bill inserts from rate base); *id.* at 554-55 (Blackmun and Rehnquist, JJ., dissenting). Indeed, the Court has already rejected a constitutional attack on just such an order. *Rochester Gas & Electric Corp. v. Public Service Commission*, 51 N.Y.2d 823, 413 N.E.2d 359, 433 N.Y.S.2d 420 (1980), *appeal dismissed*, 450 U.S. 961 (1981). Congress, too, has required state utility commissions to consider adopting similar policies. *See* 16 U.S.C. § 2623(b)(5) (requiring state utility commissions to conduct hearings and determine whether to adopt federal standard requiring electric utility shareholders to pay for all direct and indirect costs of the utilities' promotional and political advertising). An order explicitly requiring Appellant's shareholders to bear these costs would have been *more* burdensome to PG&E than the order it complains of,[9] yet such an order would be no more than a typical example of state economic regulation which must be upheld if supported by a rational basis (*see, e.g., City of New Orleans v. Dukes*, 427 U.S. 297 (1976); *Ferguson v. Skrupa*, 372 U.S. 726 (1963)), and which would raise no First Amendment issue. *A fortiori*, the California Supreme Court's decision in this case—which Appellant has not shown will result in *any* increased postage—does not violate the First Amendment.[10]

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[9] Instead of requiring PG&E to pay *all* postage costs for *Progress*, the PUC has required it to pay such costs *at most* only four months per year, and then only if the TURN inserts consume all the extra space.

[10] Requiring Appellant's shareholders to pay for *all* costs associated with mailing *Progress* would not only be constitutionally *permissible*, but might also be constitutionally *required*, under the rule set forth in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). This issue was left open in *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 543 n. 13 (1980), and similarly is not presented here. However, the fact that Appellant may be constitutionally compelled to shoulder the entire cost of mailing *Progress* quite clearly illustrates the insubstantiality of the claim that its First Amendment rights are being violated merely because the PUC's order poses a speculative threat that Appellant might have to incur such expense.

C. The California Supreme Court's Decision Passes Constitutional Muster Under The First Amendment Standards Applicable To "Content-Neutral" Regulations.

The foregoing analysis would justify dismissal of this appeal without subjecting the California Supreme Court's decision to *any* of the traditional tests used for evaluating official action which has a demonstrable impact on First Amendment rights. The decision below neither impairs Appellant's ability to communicate regarding specifically-proscribed issues nor imposes any restriction on when, where or how Appellant may engage in expressive activity. Thus, *both* the rigorous "compelling state interest" test used to evaluate statutes or regulations which are "based either upon the content or subject matter of speech" (*Regan v. Time, Inc.*, ____ U.S. ____, 52 U.S.L.W. 5084, 5086 (July 3, 1984)), *and* the more relaxed standards applied to "viewpoint neutral" regulations (*see, e.g., Clark v. Community for Creative Non-Violence*, ____ U.S. ____, 52 U.S.L.W. 4986 (June 29, 1984)) are irrelevant to this case. But because Appellant contends that the PUC's decision must satisfy the most demanding level of First Amendment scrutiny (J.S. 18-20), we shall briefly discuss these traditional First Amendment tests. We shall first respond to Appellant's contention that the decision below is content-based and therefore must be precisely drawn to serve a compelling state interest (*see* Part I(C)(1), *infra*) and then evaluate the decision under the "time, place and manner" standards and the principles enunciated in *United States v. O'Brien*. *See* Part I(C)(2), *infra*.

1. The Decision Below Is "Content-Neutral" And Therefore Need Not Satisfy The Most Demanding Level Of First Amendment Scrutiny.

The most rigorous level of First Amendment analysis is utterly irrelevant here. Such analysis is reserved for government regulation of speech which "discriminate[s] on the basis of content" (*Regan v. Time, Inc., supra*, 52 U.S.L.W. at 5087), and there is no such discrimination in this case. To the contrary, the decision

below is "content-neutral," since it leaves Appellant free to communicate on any or all subjects. For this reason, the opinion which accompanied the PUC's order contained no evaluation of the wisdom or desirability of either Appellant's speech or that of TURN. Indeed, the PUC explicitly *rejected* Appellant's invitation to evaluate the merits of its speech.[11]

Appellant nevertheless contends that the PUC's order was based upon its value judgment that permitting TURN to utilize the extra space on a limited, experimental basis would use that space "more efficiently for the rate-payers' benefit" than if the space continued to be monopolized by Appellant. J.S. 17 (citing J.S. App. 21). Appellant urges that the PUC's judgment as to how the extra space could be used "more efficiently" necessarily rested upon its determination that TURN's speech was "more important" than that of Appellant. *Id.*

Appellant's argument confuses a bias in favor of TURN's speech—which the PUC at no time exhibited—with a preference for more speakers. The PUC was not required to, and did not, evaluate the competing merits of Appellant's and TURN's envelope inserts in concluding that permitting two speakers to utilize the extra space, rather than one, would serve the ratepayers' interests. PUC App. 27-28. The Commission's explicit finding

[11] Appellant attempted to introduce evidence before the PUC that "readers of *Progress* rated the quality of . . . articles quite favorably; that the readers find the information useful, that the percentage of the readers that find the information useful is at the percentage of approximately 87% . . . that the *Progress* deals mostly with conservation issues and that the overall readership and receipt of these conservation articles is very good in that 88% call energy conservation advice in *Progress* excellent or very good." Tr. 597. TURN objected to the introduction of this evidence on the ground that it was irrelevant, precisely because the Commission was not engaging in balancing the merits of Appellant's speech versus TURN's. *Id.* at 584. The PUC's administrative law judge excluded the evidence and the PUC affirmed this ruling. PUC App. 9-11. Thus, with supreme indifference to the irony of its sudden about-face, Appellant now accuses the PUC of doing precisely what it unsuccessfully requested the PUC to do in the proceedings below. Appellant has managed to be wrong on both occasions.

that consumers "will benefit more from exposure to a wide variety of views than they will from only that of PG&E" (PUC App. 22) is not an official disparagement of Appellant's speech but simply an endorsement of diversity over exclusivity.[12] The PUC's order therefore did not involve an evaluation of Appellant's speech or that of TURN and neither, of course, did the California Supreme Court's affirmance of the order.

Because the decision below is content-neutral, this Court need not determine whether it "is a precisely drawn means of serving a compelling state interest." *Consolidated Edison Co. v. Public Service Commission, supra,* 447 U.S. at 540. Thus, the decision is subject to First Amendment scrutiny, if at all, only under the less demanding tests applicable to government regulations, such as "time, place, and manner" restrictions, that "are justified without reference to the content of the regulated speech . . . ." *Clark v. Community for Creative Non-Violence, supra,* 52 U.S.L.W. at 4987.

2. The PUC's Order Is Narrowly Drawn To Further Important Governmental Interests And Leaves Appellant With Ample Alternative Means Of Communication.

Content-neutral regulations of speech are constitutional if "they are narrowly tailored to serve a significant governmental interest, and . . . they leave open ample alternative channels for communication of the information." *Id.* Assuming *arguendo* that *any* degree of judicial scrutiny is required (*but see* Part I (C)(1), *supra*), the PUC's order easily passes this test.

To begin with, the order is "narrowly tailored" to serve at least four governmental interests which are certainly significant and which may well be compelling. *First*, the order is intended to

[12] The PUC's desire to expose ratepayers to several viewpoints is obviously consistent with the First Amendment, which, as the Court has stated on numerous occasions, was designed not only to bar government encroachment on freedom of speech, but affirmatively to encourage "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press v. United States,* 326 U.S. 1, 20 (1945). *See also Buckley v. Valeo,* 424 U.S. 1, 93 and n.127 (1976); *CBS, Inc. v. FCC,* 453 U.S. 367, 396 (1981).

promote "the most complete understanding possible of energy-related issues" (PUC App. 27), by opening up the billing envelope to a multiplicity of voices. *Second*, the order is designed to further the "fullest possible consumer participation in CPUC proceedings . . . ." *Id. Third*, the order is intended to prevent Appellant from arrogating to itself the economic value of the extra space, which the PUC had previously determined to be ratepayer property. *Id.* at 26, 28, 32. *Fourth*, and finally, the order was fashioned as a remedy for Appellant's violation of federal law, a violation which the PUC found to exist in the general rate proceeding which led to this case. *Id.* at 8; *see also* J.S. App. 67, 69-71.

There is little doubt that these interests are constitutionally sufficient to support the PUC's decision. There is unquestionably a substantial state interest in expanding the nature and range of the information available to ratepayers, through opening the extra space in the billing envelope to a multiplicity of voices. *See* note 12, *supra*. Furthering the ability of groups such as TURN to participate in PUC proceedings similarly enhances the democratic process and results in more informed decisions, as well as providing economic benefits to the groups whose interests will be served by such representation.[13] The PUC's attempt to prevent Appellant from monopolizing the extra space also furthers the

[13] The PUC specifically found in its *UCAN* decision (and it reiterated this finding in the decision below) that "participation by representatives of consumer groups tends to enhance the record in our proceedings and complements the efforts of the Commission staff." PUC App. 36; *see also* J.S. App. 95 (*UCAN* decision). The importance of encouraging wider participation in state utility commission ratemaking has also been recognized by Congress. In enacting the Public Utility Regulatory Policies Act (PURPA), one of Congress' primary goals was to encourage intervention by electric consumers in ratemaking proceedings. *See* 16 U.S.C. § 2631 (granting "any electric consumer of an affected electric utility" the right to "intervene and participate as a matter of right in any ratemaking proceeding" conducted by a State regulatory authority), § 2632 (attorney's fees), § 2633 (judicial review).

important constitutional objective of preventing the forced subsidy by the ratepayers of Appellant's communications, in possible violation of *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).[14] Finally, the PUC's decision serves the obviously substantial interest of remedying Appellant's prior failures to comply with the federal standard set forth in PURPA preventing utilities from saddling their ratepayers with the direct or indirect costs of political advertising.

Appellant's submission on this point is utterly lacking in substance. Although it baldly asserts that the first two interests identified above—promoting participation in PUC proceedings and providing more information to ratepayers—are not compelling (J.S. 23), that is not the relevant inquiry. *See* Part I(C)(1), *supra*. Moreover, Appellant's *ipse dixit* is no substitute for a sensitive analysis of these two governmental interests, let alone a demonstration that they are not "significant," "important," or even "compelling." And because the remainder of Appellant's discussion of this issue rests entirely upon a single, irrelevant sentence from *Buckley v. Valeo*, Appellant fails even to discuss the other two interests served by the decision below.[15]

The PUC's order is also "narrowly tailored" to further the interests described above. It is readily apparent that the best

[14] The Court in *Consolidated Edison* clearly indicated that the New York PSC would be justified in adopting measures to remedy the problem of forced subsidization by the ratepayers of a utility's communications, even if the remedy was to exclude the cost of the utility's envelope inserts from the rate base altogether. *See* 447 U.S. at 543; *id.* at 544 (Marshall, J., concurring); *id.* at 551-54 (Blackmun and Rehnquist, JJ., dissenting). Indeed, elimination of the forced subsidy may not only be constitutionally permissible, but also constitutionally required. *See* note 10, *supra*.

[15] Appellant cites *Buckley v. Valeo*, 424 U.S. 1 (1976), for the proposition that "government may [not] restrict the speech of some elements of our society in order to enhance the relative voice of others . . . ." *Id.* at 48-49. But this principle is inapplicable to this case, because no speech of Appellant's has been suppressed, nor (as was true in *Buckley*) have any restrictions been imposed on the amount Appellant may expend to disseminate its own views. *See* Part I(A), *supra*.

available method for ending Appellant's monopolization of the billing envelope extra space is to permit more than one entity to have access thereto.[16] Similarly, permitting TURN to solicit funds in the billing envelope—and requiring it to use the funds thereby generated in PUC proceedings relating to Appellant's rates—is undoubtedly an effective means of furthering TURN's participation in PUC proceedings.[17] By enabling a representative of Appellant's residential ratepayers to use the extra space, the decision effectively prevents Appellant from arrogating the economic value of the extra space entirely to itself, as well as remedying Appellant's prior, unlawful use of that space to subsidize its political communications.[18]

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[16] Appellant speculates that exposing the ratepayers to a diversity of views could be served by publicly funding mailings by consumer groups. J.S. 24. This alternative, however, does not solve the economic and constitutional problems created by permitting Appellant to monopolize property which California law holds belongs to the ratepayers. Moreover, it is possible that a communication included in a billing envelope has a greater likelihood of being read by the recipient than one enclosed in a separate mailing.

[17] While Appellant contends that the purpose of promoting participation in PUC proceedings could be equally well served by awarding attorney's and expert witness' fees, it has not attempted to rebut the showing which TURN made below that because such fees are only awarded after the fact (and often after lengthy delays until a proceeding becomes final), they do not enable financially pressed groups such as TURN to hire the expert witnesses and attorneys they need. *See Ex.* 1 at 6.

[18] Even if Appellant could suggest some alternative to the PUC's decision which this Court might surmise would have less of an impact upon Appellant's alleged First Amendment rights, that would not warrant invalidation of the PUC's judgment. In the absence of the strictest level of First Amendment scrutiny, the Court may not substitute its assessment of how best to further the interests served by the decision below for that of the PUC. *See Clark v. Community for Creative Non-Violence, supra,* 52 U.S.L.W. at 4989. Indeed, "[t]he less-restrictive-alternative analysis invoked by [Appellant] has never been a part of the inquiry into the validity of a time, place, and manner regulation. It is enough that the . . . restriction substantially serves the

It also is obvious that the California Supreme Court's affirmance of the PUC's order leaves Appellant with "ample alternative channels for communication" of whatever information it wishes to communicate. *Clark v. Community for Creative Non-Violence, supra,* 52 U.S.L.W. at 4987. As noted in Part I(A), *supra,* the decision below does not inhibit Appellant's ability to communicate in any way. Indeed, the decision leaves Appellant with precisely the same channels for communicating its views that it has always used—including the insertion of its messages in the customer billing envelopes. Because Appellant has more than ample opportunities to "reach the minds of willing listeners" (*Kovacs v. Cooper,* 336 U.S. 77, 87 (1949)), the decision below meets the tests applicable to content-neutral regulations.[19]

Government's legitimate ends." *Regan v. Time, Inc.,* ___ U.S. ___, 52 U.S.L.W. 5084, 5089 (July 3, 1984) (plurality opinion). For the reason stated in text, it is patent that the PUC's decision "substantially serves" the interests indentified by the PUC.

[19] Since the decision below meets the standard enunciated in this Court's cases for "time, place and manner" restrictions, it necessarily meets the "four-factors standard of *United States v. O'Brien, supra,* for validating a regulation of expressive conduct, [a standard] which, in the last analysis is little, if any, different from the standard applied to time, place, and manner restrictions." *Clark v. Community for Creative Non-Violence, supra,* 52 U.S.L.W. at 4989. If a content-neutral restriction "sufficiently and narrowly serves a substantial enough governmental interest to escape First Amendment condemnation, it is untenable to invalidate it under *O'Brien* on the ground that the governmental interest is insufficient to warrant the intrusion on First Amendment concerns or that there is an inadequate nexus between the regulation and the interest sought to be served." *Id.* at 4989 n.8.

II

THE CALIFORNIA SUPREME COURT'S DECISION DOES NOT COMPEL APPELLANT TO SUBSIDIZE SPEECH WITH WHICH IT DISAGREES, ALLOW OTHERS TO USE ITS "PROPERTY" TO DISSEMINATE THEIR MESSAGES, OR INFRINGE ON APPELLANT'S EDITORIAL CONTROL OVER ITS OWN SPEECH.

Appellant makes a variety of additional claims against the California Supreme Court's affirmance of the PUC order requiring it to include TURN's inserts four times per year. It invokes *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), *Wooley v. Maynard*, 430 U.S. 705 (1977), and *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), for a variety of generalized propositions which, on careful analysis of the facts of *this* case, are wholly inapposite.

To see why this is so, it is useful to understand what is—and what is not—before the Court on this appeal. To do so, it is necessary to describe an important aspect of the procedural history of this controversy.

In 1981, the PUC determined that the "extra space" in the billing envelope has "economic value" which is "paid for . . . by ratepayers" (Decision 93887, J.S. App. A-67, A-72, ¶ 58) and that, as a result, the extra space "is properly considered as ratepayer property." *Id.* A-72, ¶ 58. This finding was necessary to the PUC's decision that Appellant's use of the extra space for mailing *Progress* was "improper" and in violation of PURPA (*id.* A-72, ¶ 59; A-67) and that such use "deprives the ratepayers of[] the economic value of the 'extra' space in the billing envelope." *Id.* A-72, ¶ 59. Appellant unsuccesfully sought a rehearing of Decision 93887, attacking these very findings. But it did not seek review of that decision either in the California Supreme Court or in this Court. [20]

[20] There was a petition for review of Decision 93887, but it was filed by TURN, not PG&E. PG&E responded to the petition by saying that if review were granted the court should also review the PUC's finding that the extra space in the billing envelope was ratepayer property. The California Supreme Court denied TURN's petition.

Under California law, those findings cannot be relitigated now that the California Supreme Court has declined review and the PUC decision has become final. *People v. Western Air Lines, Inc.*, 42 Cal. 2d 621, 630-31, 268 P.2d 723, 728 (1954); *Consumers Lobby Against Monopolies v. PUC*, 25 Cal 3d 891, 901, 160 Cal. Rptr. 124, 129, 603 P.2d 41, 46 (1979) ("[O]ur denial of such a petition raises the bar of res judicata against relitigation of the same cause of action between the same parties or their privies"); *see also* Cal. Pub. Util. Code § 1709 ("In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive").

In accordance with those established rules of California law, the PUC held in the instant case that its prior Decision 93887 had already determined that the extra space had economic value and belonged to the ratepayers (PUC App. 33, Findings of Fact ¶¶1, 3, 4) and that these findings "should not be relitigated in this proceeding." *Id.* at 36, Concl. of Law ¶1; *see also id.*, ¶2. In seeking a writ of review in the California Supreme Court, Appellant complained that the PUC had erred, under California law, in precluding it from relitigating those issues in the present case. *See* Reply Brief In Support of Petition For Writ of Review of Pacific Gas and Electric Company at 34-42. The California Supreme Court denied review, however, and its affirmance of the PUC's refusal to permit relitigation of an issue of *state* law settled in a prior, and now final, proceeding plainly rests upon an independent and adequate non-federal ground.

Accordingly, for purposes of this Court's determination of PG&E's appeal, the issue of whether California properly has treated the extra space in the billing envelope as ratepayer property is not properly presented here. At this juncture, then, the issue to be determined is whether, in light of that earlier determination that the extra space in the billing envelope is *not* the property of PG&E but belongs to the ratepayers, California can require PG&E to use the ratepayers' extra space to transport TURN's mailings four times per year without transgressing the principles established in *Abood v. Detroit Board of Education*,

supra, Wooley v. Maynard, supra, or *Miami Herald Publishing Co. v. Tornillo, supra.*

Appellant makes only a fleeting reference to *Abood.* That decision confirms that the state may not compel a citizen "to contribute [financially] to the support of an ideological cause he may oppose . . . ." 431 U.S. at 235. This salutary principle is simply not implicated in this case. As the PUC found, the costs of mailing the billings are borne not by PG&E but by the ratepayers (PUC App. 36, Finding of Fact ¶ 27), and all additional costs of printing and inserting TURN's billing inserts must be reimbursed by TURN. PUC Order ¶ 5(d), PUC App. 38-39. In any event, because the "extra space" in the billing envelope was conclusively found in the prior PUC proceeding to be *ratepayer* property, there is no basis for PG&E's assertion that *its* property is being used in a manner that constitutes a form of coerced subsidy.

PG&E's claim that the PUC's decision is infirm under *Wooley v. Maynard, supra* is answered by this Court's rejection of a similar claim in *PruneYard Shopping Center v. Robins,* 447 U.S. 74 (1980):

> "Appellants finally contend that a private property owner has a First Amendment right not to be forced by the State to use his property as a forum for the speech of others. They state that in *Wooley v. Maynard,* 430 U.S. 705, 51 L. Ed. 2d 752, 97 S. Ct. 1428 (1977), this Court concluded that a State may not constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public. This rationale applies here, they argue, because the message of Wooley is that the State may not force an individual to display any message at all.
>
> "Wooley, however, was a case in which the government itself prescribed the message, required it to be displayed openly on appellee's personal property that was used 'as part of his daily life,' and refused to permit him to take any measures to cover up the motto even though the Court

> found that the display of the motto served no important state interest. Here, by contrast, there are a number of distinguishing factors. Most important, the shopping center by choice of its owner is not limited to the personal use of appellants. It is instead a business establishment that is open to the public to come and go as they please. The views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner. Second, no specific message is dictated by the State to be displayed on appellants' property. There consequently is no danger of governmental discrimination for or against a particular message. Finally, as far as appears here appellants can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand. Such signs, for example, could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law." (*Id.* at 85-87)

In the present case, as in *PruneYard*, there is no danger that the views of TURN will be misidentified as those of PG&E. Indeed, the PUC has taken pains to ensure that no such confusion will occur by requiring that each insert "clearly identify TURN as its source and state that its contents have been neither reviewed nor endorsed by PG&E or this Commission." PUC Order ¶ 5(e), PUC App. 39. Moreover, again as in *PruneYard*, the state has dictated no specific message, and thus there is "no danger of governmental discrimination for or against a particular message." And, as in *PruneYard*, PG&E remains free to disavow any connection with TURN's inserts, although the PUC-mandated disclaimer which TURN itself must include presumably makes it unnecessary for PG&E to do so.

The one factual element which differentiates this case from *PruneYard*, far from supporting Appellant, further undercuts its analogy to *Wooley*. In *Wooley* and in *PruneYard*, the message which was objected to had to be displayed on the citizen's own

property.[21] Here, by contrast, it is conclusively established for purposes of this appeal that the extra space in the billing envelope is *not* PG&E's property. Since PG&E is required to support TURN's message with neither its property nor its pocket book, its analogy to *Wooley* lacks substance.

Appellant seeks to distinguish *PruneYard* on the ground that while a shopping center is not limited to the use of its owners, a billing envelope is. J.S. 16. In fact, the comparison cuts the other way. A shopping center, at least prior to *PruneYard*, was private property over which the owner could exercise virtually unfettered control; and shopping center owners frequently exercised that power to bar all dissemination of handbills and other forms of speech. *See PruneYard, supra*, 447 U.S. at 80; *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972) (upholding outright ban on expressive activity). By contrast, Appellant is a regulated utility, and for many years has printed and disseminated a host of notices *required by the PUC*, without regard to whether it agreed with them or not. *See* PUC App. 6-8 (listing history of PUC-required inserts); *see also* PUC Motion to Dismiss at 10-14.

This Court's decisions since *PruneYard* refute Appellant's contention that the Constitution confers upon a utility exclusive control over the contents of the billing envelope. In *Consolidated Edison Co. v. Public Service Commission, supra*, the state utility commission sought to defend its prohibition of utility political messages on the ground that the billing envelope could accommodate "only a limited amount of information," and that political messages might displace other desirable envelope inserts. *Id.* at 542. The Court, however, rejected this argument, stating that there was nothing in the record showing that "the presence of the bill inserts at issue would preclude the inclusion of other inserts that Consolidated Edison *might be ordered lawfully to include in the billing envelope.*" *Id.* at 543 (emphasis added). Similarly,

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[21] Thus, in *PruneYard*, the Court summarized the First Amendment claim as "that a *private property owner* has a First Amendment right not to be forced by the State to use *his property* as a forum for the speech of others." 447 U.S. at 85 (emphasis added).

in *Central Hudson Gas & Electric Co. v. Public Service Commission*, 447 U.S. 557 (1980), the Court invalidated a utility commission order prohibiting utilities from promoting electricity use on the ground, *inter alia*, that the state's goal of promoting conservation could be adequately protected by requiring that the utility's advertisements contain specified conservation-related information. *See id.* at 572. If a state constitutionally may require a utility to include a government-sponsored message in its advertisements, *a fortiori* there is no constitutional barrier to requiring that the utility envelope be opened for the messages of third parties. *See PruneYard, supra*, 447 U.S. at 87 (compelling display of a state-prescribed message requires greater justification under First Amendment than requiring the opening of a shopping center to a large number of diverse messages).[22]

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[22] There is certainly no general principle of law that a corporation such as Appellant may not be required to serve as a conduit for the messages of others. The SEC's proxy rules, for example, require covered corporations to include in their proxy materials certain shareholder proposals and statements in support thereof. Rule 14a-8(b)(1), 17 C.F.R. § 240.14a-8(b)(1). Such shareholder proposals may concern matters of great public controversy, discussion of which clearly enjoys First Amendment protection. *See, e.g., SEC v. Medical Committee for Human Rights*, 404 U.S. 403 (1972) (shareholder resolution relating to use of company's product in Vietnam); *see also First National Bank v. Bellotti*, 435 U.S. 765, 794 (1978) ("Ultimately shareholders may decide, through the procedures of corporate democracy, whether their corporation should engage in debate on public issues"). The constitutionality of these rules has never been questioned.

There are also a host of situations in which government directly requires private parties to communicate specified messages themselves. *See, e.g.*, 15 U.S.C. §§ 77j, 77aa (listing material required to be included in securities prospectuses); 15 U.S.C. § 1333 (requiring prescribed health warning to appear on all cigarette packages); 15 U.S.C. § 1637 (requiring specified disclosures for open end consumer credit plans); 15 U.S.C. §1638 (requiring specified disclosures for other consumer credit transactions). *See also Central Hudson Gas & Electric Co. v. Public Service Commission*, 447 U.S. 557, 571 (1980) (utility commission could require utility to include specified information in its advertisements).

The third case on which PG&E relies, *Miami Herald Publishing Co. v. Tornillo, supra,* is equally far from the mark. In *Tornillo,* the Court held unconstitutional a statute granting political candidates a right to equal newspaper space for reply to criticism or attacks on the candidate's record published in a newspaper. In the present case, TURN has been granted no right to invade the pages of PG&E's newspaper *Progress.* Nor is its right of periodic access to the *ratepayers'* property—the extra space in the billing envelope—triggered by the particular content of PG&E's speech in *Progress.* This Court's rejection of a similar claim in *PruneYard* thus disposes of PG&E's assertion here:

> "Tornillo struck down a Florida statute requiring a newspaper to publish a political candidate's reply to criticism previously published in that newspaper. It rests on the principle that the State cannot tell a newspaper what it must print. The Florida statute contravened this principle in that it 'exact[ed] a penalty on the basis of the content of a newspaper.' 418 U.S. at 256. There also was a danger in Tornillo that the statute would 'dampe[n] the vigor and limi[t] the variety of public debate' by deterring editors from publishing controversial political statements that might trigger the application of the statute. *Id.* at 257. Thus, the statute was found to be an 'intrusion into the function of editors.' *Id.* at 258. These concerns obviously are not present here." (447 U.S. at 88)

III

THE COURT NEED NOT GIVE PLENARY CONSIDERATION TO THIS CASE BECAUSE THE PUC'S ORDER PROVIDES ONLY TEMPORARY ACCESS TO THE BILLING ENVELOPE, MAY BE MODIFIED IN THE EVENT OF SUBSTANTIAL INTERFERENCE WITH APPELLANT'S FIRST AMENDMENT RIGHTS, IS NOT IN CONFLICT WITH THE DECISIONS OF THIS COURT OR THOSE OF ANY OTHER COURT, AND DEPENDS ON FACTORS WHICH MAY NOT BE PRESENT IN OTHER CASES.

In addition to the insubstantiality of the constitutional claims presented, there are additional, prudential reasons why plenary consideration of this case would be an unwise use of the Court's resources. These reasons concern, first, the temporary and experimental nature of the relief granted below; second, the absence of any conflict between the California Supreme Court's decision in this case and the decisions of this Court or those of any other court; and third, the unique facts of this case which make it an inappropriate vehicle for resolving the constitutional claims presented by Appellant.

The effect of the decision below is to provide TURN with limited access to the billing envelopes over a two-year period. The PUC explicitly retained jurisdiction to issue "further clarifying orders" in the event problems develop with the implementation of its decision (PUC App. 24), and it required TURN to file two reports mid-way through and at the end of the two-year period. *Id.* at 23. Thus, the PUC has reserved jurisdiction to modify the order if it has a greater impact on Appellant's ability to communicate than Appellant has so far been able to demonstrate,[23] and it will obviously undertake a complete re-evaluation

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[23] To take one obvious example of the kind of ameliorative order that the PUC could issue, one of TURN's attorneys indicated during the proceedings below that TURN could abide by a reasonable weight limitation on the materials it inserts in the billing envelope. Tr. 392-93. Although the PUC did not require TURN to submit to any such limitation, it is obviously within the PUC's power to adopt a weight

of the merits and demerits of providing access once the experiment is over. For this reason, even if the PUC's decision were to result in an actual impairment of Appellant's ability to communicate—which, for the reasons stated above, is most improbable—any impairment could be quickly remedied. "The potential for such administrative solutions confirms the conclusion that the . . . issue . . . simply is not ripe for judicial resolution." *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 297 (1981).[24]

Nor does the California Supreme Court's affirmance of the PUC's order contravene any decision of this Court. *Cf.* Sup. Ct. R.17.1(c) (certiorari will be granted when a state court "has decided a federal question in a way in conflict with applicable decisions of this Court"). While Appellant (at J.S. 10-11) asserts that a conflict exists between the ruling below and the Court's decisions in *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530 (1980), and *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), Appellant's claim ignores the critical difference between those cases and this one: that, while attempts were made in both of the prior cases to suppress utility speech, the PUC has not in this case impaired Appellant's communicative rights in any

limit in the event that its access decision imposes undue financial burdens on Appellant's own speech.

[24] The constitutional claims discussed in Parts I and II, *supra*, may come to the Court with somewhat different degrees of ripeness. As noted in text, Appellant's claim that the decision below impairs its right to communicate is premature, because Appellant has failed to show that such impairment has occurred or will occur or that the PUC could not remedy any impairment that might occur. The claims discussed in Part II, by contrast, do not depend on the effect of the PUC's order as applied; they turn, instead, on its facial validity. While these latter contentions are thus ripe for adjudication, they are so insubstantial, and so obviously foreclosed by the prior decisions of the Court, that plenary consideration of these contentions alone would be a waste of time.

way.[25] *See* Part I(A), *supra*. The decision below therefore does not conflict with any decision of this Court, and even Appellant does not suggest that a conflict exists with a decision of any other court.

Finally, there are two peculiarities in the factual record of this case which affect the constitutional balance here and which may make this case atypical of the several controversies brewing in other states between utilities and groups seeking access to the billing envelope. As noted above, there is in this case a prior determination, final as a matter of state law, that the extra space in the billing envelope belongs to the ratepayers, not the utility. *See* pp. 18-19, *supra*. This appeal therefore does not present the constitutional questions that would be raised if a state sought to enforce access to a utility billing envelope that was clearly recognized as utility property under state law, such as the question of whether such enforced access constitutes a "taking" of utility property for which the Fifth Amendment requires just compensation.[26] Moreover, and perhaps even more unique to this

[25] In fact, statements in the Court's opinions in both *Consolidated Edison* and *Central Hudson* strongly support the propriety of the decision below. *See* pp. 22-23, *supra*.

[26] Contrary to the assertion of some amici curiae, no Fifth Amendment claim is presented by the Jurisdictional Statement, nor is such a claim "fairly included therein." Sup. Ct. R. 15.1(a). Indeed, Appellant asserts that the question of who owns the extra space "is irrelevant when measuring state regulation against required constitutional standards." J.S. 22. Since the Fifth Amendment claim was presented below as a separate and independent basis for the asserted invalidity of the PUC's order (*see* J.S. 7, 8), Appellant's failure to raise the issue in this Court plainly constitutes an "intentional relinquishment" of review by this Court of the California Supreme Court's rejection of Appellant's Fifth Amendment claim.

Moreover, even if this contention had been presented by the Jurisdictional Statement, the California Supreme Court's decision that there was no unconstitutional "taking" in this case plainly rests upon an adequate, non-federal ground. As noted in text, the California courts determined in a prior proceeding that the extra space is ratepayer property, not that of Appellant, and no review of that decision was sought in this Court. Appellant cannot now claim compensation under

case, the decision below was intended to remedy a prior and (and final) determination that Appellant had violated federal law by recouping some of the costs for its political advertising from the ratepayers, in violation of a PURPA standard which the PUC had adopted. *See* p. 14, *supra.* Since a pre-existing violation of law may warrant the imposition of equitable relief which might not otherwise be constitutionally permissible (*Firefighters Local Union No. 1784 v. Stotts,* — U.S. —, 52 U.S.L.W. 4767 (June 12, 1984)), plenary consideration of the PUC's decision in this case would not necessarily resolve the constitutional claims raised by utilities where no prior violation of federal law had been established.

In summary, the constitutional claims presented by Appellant are not ripe for review at this juncture and there is no assurance that they ever will become so. The decision below neither contravenes decisions of this Court nor conflicts with decisions from other courts. The decision below also turns on factors which may be unique to this case. Plenary consideration of the case is thus unwarranted.

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the Fifth Amendment for the "taking" of property which state law has conclusively determined never belonged to it in the first place.

CONCLUSION

Appellees TURN, California Public Interest Research Group, Common Cause of California, Consumers Union, and Consumer Federation of California respectfully submit that the question presented in Appellant's Jurisdictional Statement is so insubstantial as not to need further argument, and therefore respectfully move the Court to dismiss the the appeal for want of a substantial federal question.

DATED: March 1, 1985.

Respectfully submitted,

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